

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

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MARK J. HANSEN, MONICA S.  
HANSEN, BERNIE L. HANSEN,  
KELLY A. HANSEN, CARL J.  
BARTALDO, DONALD R. LANCASTER,  
CONSTANCE A. LANCASTER, SHASTA  
GENERAL ENGINEERING, INC., a  
California Corporation,

Plaintiffs,

v.

ARTHUR SCHUBERT, GREG A.  
ZIEGLER, VINCENT ZAMBRANA,  
STEPHANIE McCALL, CRAIG  
BURSON,

Defendants.

NO. CIV. S-02-0850 FCD GGH

MEMORANDUM AND ORDER

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This matter is before the court on the parties' supplemental  
briefing on defendants'<sup>1</sup> motion for summary judgment pursuant to

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<sup>1</sup> The court notes that in plaintiffs' supplemental  
briefing, the caption includes numerous defendants who are no  
longer in this litigation due to voluntary dismissals by  
plaintiffs or due to the court's prior rulings. The court also  
notes the this caption does not include defendant Zambrana. The  
(continued...)

1 Federal Rule of Civil Procedure 56<sup>2</sup> on plaintiffs' due process  
2 claim. Due to the minimal attention directed to this issue in  
3 the original motion and opposition and the resulting oversight of  
4 the due process claim in the September 28, 2006 Memorandum and  
5 Order, (Docket # 102), at the status conference held January 19,  
6 2007, the court asked the parties to submit supplemental briefing  
7 on this claim, not to exceed 10 pages.<sup>3</sup> For the reasons set  
8 forth below,<sup>4</sup> defendants' motion for summary judgment on  
9 plaintiffs' due process claim is GRANTED.<sup>5</sup>

10 **STANDARD**

11 Summary judgment is appropriate when it is demonstrated that  
12 there exists no genuine issue as to any material fact, and that  
13 the moving party is entitled to judgment as a matter of law.  
14 Fed. R. Civ. P. 56(c); Adickes v. S.H. Kress & Co., 398 U.S. 144,  
15 157 (1970).

16 Under summary judgment practice, the moving party  
17

18 <sup>1</sup>(...continued)  
19 remaining defendants in this case are Arthur Schubert, Greg A.  
20 Ziegler, Vincent Zambrana, Stephanie McCall, and Craig Burson.  
21 The court will consider plaintiffs' due process claim against  
22 these defendants only.

23 <sup>2</sup> Any further references to a "Rule" or "Rules" are to  
24 the Federal Rules of Civil Procedure unless otherwise indicated.

25 <sup>3</sup> The court's attention was first directed to its  
26 oversight in the joint pretrial statement, filed January 11,  
27 2007. (Docket # 110).

28 <sup>4</sup> Because oral argument will not be of material  
assistance, the court orders this matter submitted on the briefs.  
See E.D. Cal. L.R. 78-230(h).

<sup>5</sup> The facts of this case are set out in the memorandum  
and order addressing defendants' original motion for summary  
judgment, and are thus not repeated herein. (See Docket # 102).

1 always bears the initial responsibility of informing  
2 the district court of the basis of its motion, and  
3 identifying those portions of "the pleadings,  
4 depositions, answers to interrogatories, and admissions  
on file together with the affidavits, if any," which it  
believes demonstrate the absence of a genuine issue of  
material fact.

5 Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). "[W]here the  
6 nonmoving party will bear the burden of proof at trial on a  
7 dispositive issue, a summary judgment motion may properly be made  
8 in reliance solely on the 'pleadings, depositions, answers to  
9 interrogatories, and admissions on file.'" Id. at 324. Indeed,  
10 summary judgment should be entered against a party who fails to  
11 make a showing sufficient to establish the existence of an  
12 element essential to that party's case, and on which that party  
13 will bear the burden of proof at trial. Id. at 322.

14 If the moving party meets its initial responsibility, the  
15 burden then shifts to the opposing party to establish that a  
16 genuine issue as to any material fact actually does exist.  
17 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574,  
18 585-87 (1986); First Nat'l Bank v. Cities Serv. Co., 391 U.S.  
19 253, 288-89 (1968). In attempting to establish the existence of  
20 this factual dispute, the opposing party may not rely upon the  
21 denials of its pleadings, but is required to tender evidence of  
22 specific facts in the form of affidavits, and/or admissible  
23 discovery material, in support of its contention that the dispute  
24 exists. Fed. R. Civ. P. 56(e). The opposing party must  
25 demonstrate that the fact in contention is material, i.e., a fact  
26 that might affect the outcome of the suit under the governing  
27 law, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986),  
28 and that the dispute is genuine, i.e., the evidence is such that

1 a reasonable jury could return a verdict for the nonmoving party,  
2 Id. at 251-52.

3 In the endeavor to establish the existence of a factual  
4 dispute, the opposing party need not establish a material issue  
5 of fact conclusively in its favor. It is sufficient that "the  
6 claimed factual dispute be shown to require a jury or judge to  
7 resolve the parties' differing versions of the truth at trial."  
8 First Nat'l Bank, 391 U.S. at 289. Thus, the "purpose of summary  
9 judgment is to 'pierce the pleadings and to assess the proof in  
10 order to see whether there is a genuine need for trial.'" Matsushita,  
11 475 U.S. at 587 (quoting Rule 56(e) advisory  
12 committee's note on 1963 amendments).

13 In resolving the summary judgment motion, the court examines  
14 the pleadings, depositions, answers to interrogatories, and  
15 admissions on file, together with the affidavits, if any. Rule  
16 56(c); SEC v. Seaboard Corp., 677 F.2d 1301, 1305-06 (9th Cir.  
17 1982). The evidence of the opposing party is to be believed, and  
18 all reasonable inferences that may be drawn from the facts placed  
19 before the court must be drawn in favor of the opposing party.  
20 Anderson, 477 U.S. at 255. Nevertheless, inferences are not  
21 drawn out of the air, and it is the opposing party's obligation  
22 to produce a factual predicate from which the inference may be  
23 drawn. Richards v. Nielsen Freight Lines, 602 F. Supp. 1224,  
24 1244-45 (E.D. Cal. 1985), aff'd, 810 F.2d 898 (9th Cir. 1987).

## 25 ANALYSIS

### 26 I. Evidence

27 In support of the supplemental brief regarding their due  
28 process claim, plaintiffs submitted additional evidence that had

1 not been previously submitted in opposition to defendants' motion  
2 for summary judgment. At the status conference, the court  
3 ordered the parties to file supplemental *briefing*.<sup>6</sup> The court's  
4 order did not permit the parties to bring a new motion or new  
5 evidence before the court. The parties had an opportunity to  
6 present all of their evidence in support of their positions in  
7 the briefing and submissions on defendants' motion for summary  
8 judgment. The court's direction for supplemental briefing was  
9 not an invitation for plaintiffs to take a second bite at the  
10 apple in bringing new evidence to the court's attention that  
11 could have and should have been brought in the original briefing  
12 and submissions. As such, the court will not consider any new  
13 evidence filed in support of the supplemental briefing.

14 **II. 42 U.S.C. § 1983**

15 Plaintiffs brings a claim under 42 U.S.C. § 1983, alleging  
16 that defendants violated their due process rights by their  
17 unreasonable delay in returning property seized pursuant to a  
18 search warrant. The basis for plaintiffs' due process claim is  
19 set forth in the following allegations in the Second Amended  
20 Complaint:

21 Defendant government entities<sup>7</sup> refused to return many  
22 of the items seized during the raids for an excessive  
23 amount of time after the seizure, depriving the  
plaintiffs of the ability to resume and effectively

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24 <sup>6</sup> The parties were instructed that the briefing was not  
25 to exceed ten pages; plaintiffs failed to comply with the page  
limit requirement set by the court.

26 <sup>7</sup> While the allegations of the complaint allege  
27 constitutional violations by defendant government entities, none  
28 of which remain viable defendants in this action, the court will  
broadly interpret the complaint to allege a claim against the  
individual defendants as well.

1 operate their business. Despite the fact that  
2 defendant Schubert personally assured plaintiffs that  
3 computers they used on a daily basis in their business  
4 would be returned the week following the seizure, the  
5 computers were in fact not returned for 1.5 months.  
6 Other items were not returned until over a year after  
7 the raid.

8 . . . .

9 Plaintiffs have suffered loss to their business due to  
10 the continued seizure of their original financial  
11 documents.

12 Defendants informed plaintiffs of the existence of a  
13 sealed affidavit in support of the search warrant.  
14 Plaintiffs have moved to unseal the affidavit, to quash  
15 the search warrant and to have the seized property  
16 returned. Their motions have recently been granted and  
17 some of the seized property returned.

18 . . . .

19 At the time the search warrant was executed, defendant  
20 Schubert told plaintiffs that their computer files,  
21 upon which they were dependent in order to continue  
22 running their business, would be returned to them  
23 within approximately one week. Defendant Schubert's  
24 failure to keep this promise, and his deliberate  
25 refusal to return items seized within a reasonable  
26 period of time, resulted in the destruction of  
27 plaintiffs' business without due process of law.

28 (Pls.' 2d Am. Compl. ¶¶ 22-24, 29).

19 The Fourteenth Amendment to the United States Constitution  
20 provides that no state shall "deprive any person of . . .  
21 property, without due process of law." The Due Process Clause  
22 confers both procedural and substantive rights. Armendariz v.  
23 Penman, 75 F.3d 1311, 1318 (9th Cir. 1996) (citations omitted).  
24 However, plaintiffs do not specify in their Second Amended  
25 Complaint, nor clarify in their briefing, whether they are  
26 asserting a procedural or substantive due process claim. As  
27 such, the court will address plaintiffs' potential claim under  
28 both theories.

1           **A.     Procedural Due Process**

2           "The Fourteenth Amendment places procedural constraints on  
3 the actions of government that work a deprivation of interests  
4 enjoying the status of 'property' within the meaning of the Due  
5 Process Clause." Memphis Light, Gas, and Water Div. v. Craft,  
6 436 U.S. 1, 9 (1978). It is fundamental to the notion of  
7 procedural due process that "[p]arties whose rights are to be  
8 affected are entitled to be heard" and that this right to notice  
9 and an opportunity to be heard "must be granted at a meaningful  
10 time and in a meaningful manner." Fuentes v. Shevin, 407 U.S.  
11 67, 79 (1972). Although plaintiffs concede that most of their  
12 property was eventually returned, "even a temporary, nonfinal  
13 deprivation of property is nonetheless a 'deprivation' in the  
14 terms of the Fourteenth Amendment." Perkins v. City of West  
15 Covina, 113 F.3d 1004, 1010 (9th Cir. 1997), *reversed on other*  
16 *grounds by* 525 U.S. 234 (1999), *reaffirmed by* 167 F.3d 1286  
17 (1999).

18           "Procedural due process generally requires a hearing prior  
19 to deprivation." Id. (citing Fuentes, 407 U.S. at 90-91).  
20 However, "a limited number of 'extraordinary situations' justify  
21 postponing notice and the opportunity for a hearing until after  
22 the seizure of property," such as those circumstances where the  
23 seizure is "necessary to an important public interest, present[s]  
24 a special need for prompt action, and utilizes legitimate force  
25 which the government strictly controls." Id. (citing Fuentes,  
26 407 U.S. at 90-91). Specifically, there is no requirement of a  
27 pre-deprivation hearing before the seizure of possessions under a  
28 search warrant. Id.; see Fuentes v. Shevin, 407 U.S. at 93 n.30.

1 Defendants argue that plaintiffs' procedural due process  
2 claim must fail because California law affords adequate post-  
3 deprivation process. In Perkins v. City of West Covina, the  
4 plaintiffs asserted a claim against the city under § 1983 for an  
5 alleged violation of their procedural due process rights on the  
6 basis that the city failed to provide a reasonable procedure for  
7 the recovery of property seized pursuant to a search warrant.  
8 Id. The plaintiffs had remedies available to them, such as a  
9 "nonstatutory" motion for the release of property seized under a  
10 search warrant<sup>8</sup> or a remedy pursuant to § 1540<sup>9</sup> of the California  
11 Penal Code. The California Supreme Court had previously found  
12 that "[t]hese various remedies satisfy the requirements of due  
13 process." Aday v. Superior Court, 55 Cal. 2d 789, 800 (1961)  
14 (discussing §§ 1539-1540 as remedies to secure the return of  
15 property seized pursuant to a warrant). Accordingly, the Ninth  
16 Circuit held that plaintiffs had adequate post-deprivation  
17 remedies for the return of their property. Perkins, 113 F.3d at  
18 1011. However, the court held that plaintiffs should prevail on  
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20 <sup>8</sup> "Case law clearly establishes that both during and  
21 after the pendency of a criminal action, section 1536 empowers  
22 the court to entertain a summary proceeding by 'nonstatutory'  
23 motion, for the release of property seized under a search  
24 warrant." People v. Icenogle, 164 Cal. App. 3d 620, 623 (1985)  
(citing People v. Superior Court, 28 Cal. App. 3d 600, 609  
(1972); Buker v. Superior Court, 25 Cal. App. 3d 1085, 1089  
(1972)).

25 <sup>9</sup> Section 1540 of the California Penal Code provides:

26 If it appears that the property taken is not the same  
27 as that described in the warrant or that there is no  
28 probably cause for believing the existence of the  
grounds on which the warrant was issued, the magistrate  
must cause it to be restored to the person from whom it  
was taken.



1 their procedural due process claim because they were not given  
2 explicit notice of the remedies available to them. Id. at 1011-  
3 14. On the city's appeal to the Supreme Court, the Court noted  
4 that the Ninth Circuit had found that "the postdeprivation  
5 remedies for return of property established by California statute  
6 and case law satisfied the requirements of due process." City of  
7 West Covina v. Perkins, 525 U.S. 234, 239 (1999). However, the  
8 Court reversed the Ninth Circuit's holding that individualized  
9 notice of these remedies was required. Id. at 241. On remand,  
10 the Ninth Circuit affirmed the district court's grant of summary  
11 judgment on the plaintiffs' procedural due process claim and  
12 reinstated its prior opinion in all other aspects, including its  
13 holding that post-deprivation remedies provided adequate due  
14 process for the return of property seized pursuant to a search  
15 warrant. Perkins v. City of West Covina, 167 F.3d 1286 (1999).

16 In this case, defendants contend that in addition to § 1540,  
17 § 1538.5 of the California Penal Code provides an adequate post-  
18 deprivation remedy for the return of property.<sup>10</sup> Section 1538.5  
19 provides that "[a] defendant may move for the return of property  
20 . . . obtained as a result of a search or seizure" on the grounds  
21 that "[t]he search or seizure with a warrant was unreasonable."  
22 Plaintiffs thus had available to them post-deprivation procedures  
23 for the return of their property. Both the California Supreme  
24 Court and the Ninth Circuit have found that these procedures  
25 satisfy the requirements of due process. Perkins, 113 F.3d at

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26  
27 <sup>10</sup> Defendants also assert that California provides other  
28 common law remedies for persons who have been deprived of their  
property such as fraud, negligence, theft, conversion, and  
imposition of a constructive trust.

1 1011. Therefore, the court finds that plaintiffs have not stated  
2 a viable claim for violation of their procedural due process  
3 rights. As such, defendants' motion for summary judgment  
4 regarding plaintiffs' procedural due process claim is GRANTED.

5 **B. Substantive Due Process**

6 The Fourteenth Amendment also confers substantive due  
7 process rights. See Foucha v. Louisiana, 504 U.S. 71, 80 (1992);  
8 United States v. Salerno, 481 U.S. 739, 746 (1987); Daniels v.  
9 Williams, 474 U.S. 327, 331 (1986).

10 However, the use of substantive due process to extend  
11 constitutional protection to economic and property  
12 rights has been largely discredited. See generally  
13 Gerald Gunther, Constitutional Law at 432-65. Rather,  
14 recent jurisprudence restricts the reach of the  
15 protections of substantive due process primarily to the  
16 liberties "deeply rooted in this Nation's history and  
17 tradition." Moore v. East Cleveland, 431 U.S. 494, 503  
18 (1977).  
19 Armendariz, 75 F.3d at 1318-19. Further, "[w]here a particular  
20 Amendment 'provides an explicit textual source of constitutional  
21 protection' against a particular source of government behavior,  
22 'that Amendment, not the more generalized notion of substantive  
23 due process' must be the guide for analyzing these claims."  
24 Albright v. Oliver, 520 U.S. 266, 273 (quoting Graham v. Connor,  
25 490 U.S. 386, 395 (1989)).

26 Plaintiffs' § 1983 due process claim arises out of the  
27 allegation that defendants' deliberate refusal to return the  
28 seized items within a reasonable period of time resulted in the  
29 destruction of plaintiffs' business without due process of law.  
30 (Pls.' 2d. Am. Compl. ¶ 29). The unreasonable retention of  
31 seized property is the type of government conduct for which the  
32 Fourth Amendment provides explicit limitations. See United

1 States v. Tamura, 694 F.2d 591, 597 (9th Cir. 1982) (holding that  
2 the "Government's unnecessary delay in returning the master  
3 volumes appears to be unreasonable and therefore unconstitutional  
4 manner of executing the warrant"); see also Fuller v. Vines, 36  
5 F.3d 65, 68 (9th Cir. 1994), *reversed on other grounds by* 117  
6 F.3d 1425 (1997) ("A seizure of property occurs, within the  
7 meaning of the Fourth Amendment, when there is some meaningful  
8 interference with an individual's possessory interests in that  
9 property.") (internal quotations omitted). The Supreme Court has  
10 affirmatively held that where the Fourth Amendment is the source  
11 of limitations on the type of conduct challenged by a plaintiff's  
12 claims, that Amendment, rather than the more general substantive  
13 due process protections guaranteed by the Fourteenth Amendment,  
14 must govern the plaintiff's claim. Albright, 520 U.S. at 273;  
15 Graham, 490 U.S. at 395; see Armendariz, 75 F.3d at 1321. As  
16 such, because the conduct plaintiffs allege is the type of  
17 government action that the Fourth Amendment regulates, their  
18 substantive due process claim is precluded.<sup>11</sup> Therefore,

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19  
20 <sup>11</sup> In Armendariz, the Ninth Circuit held that the  
21 plaintiff's substantive due process claim was precluded because it  
22 was regulated by the Fourth and Fifth Amendments. In a footnote,  
23 the court noted that permitting the plaintiffs leave to amend  
24 would not appear to prejudice the defendants. However, in this  
25 case, because a scheduling order is in place, leave to amend not  
26 only implicates Rule 15 and the inquiry regarding prejudice to  
27 defendants; rather, a modification to the pretrial scheduling  
28 order allowing plaintiffs leave to amend must first be analyzed  
under Rule 16's diligence inquiry. Plaintiffs alleged in their  
complaint, filed September 16, 2002, and argued during the course  
of this protracted litigation that defendants' unreasonable  
retention of property violated their substantive due process  
rights, not their Fourth Amendment rights. Since the inception  
of this litigation, plaintiffs were on notice that under Graham  
and its progeny, their substantive due process claim was  
precluded. While plaintiffs have not briefed this issue, in

(continued...)

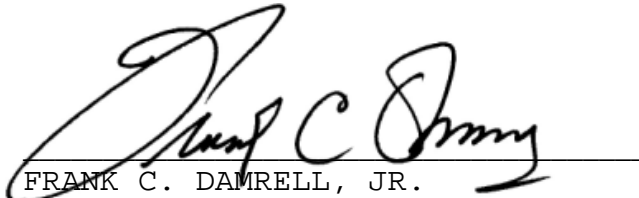
1 defendants' motion for summary judgment regarding plaintiffs'  
2 substantive due process claim is GRANTED.

3 **CONCLUSION**

4 For the foregoing reasons, defendants' motion for summary  
5 judgment regarding plaintiffs' due process claim is GRANTED.<sup>12</sup>

6 IT IS SO ORDERED.

7 DATED: April 2, 2007

8  
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10   
11 FRANK C. DAMRELL, JR.  
12 UNITED STATES DISTRICT JUDGE  
13  
14  
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16

17 <sup>11</sup>(...continued)  
18 light of the circumstances of this litigation, it would be  
19 extremely difficult for the court to find that plaintiffs had  
20 been diligent in seeking to amend their complaint. As the court  
21 has previously noted in this case, the court's acknowledgment of  
22 counsel's failure to bring a claim does not constitute the  
23 requisite diligence to modify the Pretrial Scheduling Order under  
24 Rule 16. (See Mem. & Order, Docket #109, filed Nov. 20, 2006, at  
25 10).

26 <sup>12</sup> Because defendants' motion for summary judgment  
27 regarding plaintiffs' due process claim is granted, the court  
28 does not address the issue of damages. In both the original and  
supplemental briefing, the parties addressed the issue of  
damages, and the potential limitation thereof, arising out of  
plaintiffs' *due process claim*. In the last paragraphs of their  
supplemental reply, defendants raise issues relating to damages  
arising out of plaintiffs' *First Amendment claim*. This issue has  
not been adequately raised or briefed in defendants' motion for  
summary judgment and plaintiffs have not been given adequate  
opportunity to respond. However, the court would entertain such  
argument if brought as a properly noticed motion in limine prior  
to trial in this matter.